

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR JESUS DELGADO,

Defendant and Appellant.

No. A154729

(San Francisco County Super.
Ct. No. 228711)

Defendant Victor Jesus Delgado argues the trial court erred by sentencing him to multiple punishments for the same criminal act. He appeals from the court's imposition of consecutive sentences totaling three years and eight months for the two crimes for which the jury convicted him, unlawful driving or taking a vehicle without consent of the owner and evading a peace officer in a vehicle with disregard for the safety of persons or property. He argues the court should have stayed the sentence for his unlawful driving or taking a vehicle conviction under Penal Code section 654 because both crimes involved his driving the Mini Cooper he took from a parking garage during one continuous act. We conclude there is substantial evidence that the two crimes involved separate acts, intents and objectives, even if both involved defendant's driving the same vehicle. Therefore, the trial court did not err, and we affirm the judgment.

BACKGROUND

The San Francisco County District Attorney filed an information charging Delgado with four felony counts: carjacking (Pen. Code, § 215, subd. (a), count one); evading a peace officer in a vehicle with disregard for the safety of persons or property

(Veh. Code, § 2800.2, subd. (a), count two); the unlawful taking or driving of a vehicle without the owner's consent (*id.*, § 10851, subd. (a), count three); and receipt of a stolen vehicle (*id.*, § 496d, subd. (a), count four). The district attorney also alleged certain sentence enhancements. All of the charges involved Delgado's conduct upon taking a Mini Cooper he neither owned nor had permission to use from a parking garage adjoining a San Francisco hotel on one night in February 2018.

Delgado pled not guilty, and the case was tried before a jury. During trial, the court dismissed the receipt of stolen vehicle charge (count four) at the request of the prosecution, which elected to proceed on the taking/driving a vehicle without permission charge (count three) based on a theory that the defendant took the Mini Cooper "temporarily and not with the intent to permanently deprive which would make it a theft offense."

Delgado did not contest that he unlawfully took and drove the Mini Cooper. Instead, the parties focused on whether he committed the carjacking alleged in count one, and in particular whether he took the Mini Cooper "by means of force and fear" as required by the carjacking statute, Penal Code section 215, subdivision (a).¹ The People sought to prove this element through the testimony of a parking valet that Delgado took the vehicle by threatening him with a gun, and the defense challenged the credibility of this part of the valet's account. The jury acquitted defendant of carjacking, and that verdict is not an issue in this appeal. Therefore, we do not discuss the parties' debate over the evidence that was presented on the carjacking count and will confine our summary to the evidence necessary to resolve this appeal.

At trial, the parking valet testified he was on duty at the parking garage alone on the night of February 3, 2018, when Delgado entered on a scooter between 8:00 and 8:30

¹ Penal Code section 215, subdivision (a) states: " 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear."

p.m. The valet pointed to where Delgado could park his scooter and, after conversing with him briefly, attended to two other customers who arrived in their vehicles. One customer left his pickup truck running and exited the garage. As the valet approached the truck, planning to park it in the garage, Delgado pointed a gun at him from two or three meters away and in Spanish directed the valet to give him the keys to a red Mini Cooper that was parked in the garage. The valet told Delgado the keys were on the Mini Cooper's windshield and, as Delgado went to the car, the valet moved the truck in an effort to block the garage exit and then ran upstairs to the hotel reception area to tell them to call the police. When he returned to the garage, he saw the Mini Cooper on a ramp exiting the garage. The police arrived, and he gave them details about the incident and the vehicle Delgado had taken.

San Francisco Police Officer Timothy Macaulay testified that at 8:19 p.m. on February 3, 2018, he was in uniform and in a marked police vehicle when he heard a radio call about a stolen red Mini Cooper. He and other officers responded, quickly began searching the area and saw the Mini Cooper at around 8:34 p.m. going eastbound on Bryant Street. They followed it and attempted a traffic stop from a distance of about six feet by activating the patrol car's lights and siren. The Mini Cooper did not pull over, but instead turned right and "went at a high rate of speed southbound" on 5th Street. It went through a stop sign without stopping and shortly thereafter proceeded in the wrong direction down 3rd Street. Macaulay pursued the Mini Cooper from a distance of about 30 feet with his front-facing red lights and siren activated. The Mini Cooper proceeded through a number of stop signs and at least one red light and drove "at a high rate of speed" exceeding the speed limit. Another police car joined the pursuit as the Mini Cooper drove through the Bayview district. Macaulay's highest rate of speed during the pursuit was about 65 miles an hour. Eventually, a flat tire forced him to drop the pursuit.

San Francisco Police Officer Shante Williams testified he heard a service call about a nearby pursuit at 8:23 p.m. and left the Bayview police station in uniform and driving a marked police vehicle, to join the pursuit. He quickly located the Mini Cooper and joined the pursuit with his lights and siren activated. He saw the car drive through a

stop sign in a residential area at 45 to 50 miles an hour and drive through numerous other stop signs and at least one red light. Other police vehicles joined the pursuit, and at some points police blocked traffic to prevent vehicles and pedestrians from danger. Eventually, the Mini Cooper went down a dead-end street and stopped, and the driver got out and ran away. Police apprehended him and took him into custody. At trial, Williams identified Delgado as the errant driver.

A third San Francisco police officer, Albert Johnson, testified that he joined the pursuit of the Mini Cooper in a marked police vehicle, in uniform, with his siren and lights activated, at 8:44 p.m. or 8:45 p.m. and at some point became the primary vehicle in pursuit. He pursued the Mini Cooper until it stopped and the driver got out and started running.

The owner of the Mini Cooper testified he did not know Delgado. Also, he had not given anyone permission to take the Mini Cooper from the parking garage on the day of the incident.

After the evidence was presented, the trial court instructed the jury on the crimes charged. In doing so, the court removed CALCRIM No. 1800, an instruction regarding theft by larceny,² from its instructions because, the court stated, the prosecutor had dropped the count four charge (receipt of stolen property) and had “made an election with respect to the Vehicle Code [section] 10851 charge [the driving or taking of a vehicle without the consent of the owner] to pursue a temporary deprivation theory commonly known as joyriding as opposed to permanent deprivation theft.” The jury then heard closing arguments and deliberated.

The jury acquitted Delgado of carjacking, but convicted him of count two, evading a peace officer in a vehicle with a disregard for the safety of persons or property, and

² CALCRIM No. 1800 instructs regarding a defendant’s taking possession of property owned by someone else without the owner’s consent, moving the property and keeping it for any period of time, and acting with the intention “to deprive the owner of it permanently/[or] to remove it from the owner’s . . . possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property” (See Pen. Code, § 484.)

count three, unlawful driving or taking of a vehicle without the consent of the owner. For multiple reasons, the sentence enhancements were not applied to his case.

The court sentenced Delgado to three years in prison for evading a peace officer and eight months, to run consecutively, for unlawful driving or taking a vehicle. The court rejected Delgado's argument that it should stay one of the sentences under Penal Code section 654 because, according to defense counsel, defendant was convicted of "in essence the same offense—taking the car and going out in the city; in that same event, he's being chased by the police officers." The court explained its reasoning, stating "I do not believe that the evading charge and the vehicle theft charge share one common intent. . . . I think there are two intents: One to take the car; and the other to flee once the amber lamp is lit behind you. And the fact that there was . . . an interval between the time of the theft and the time of the evading is simply an additional fact that makes the [Penal Code section] 654 issue a nonstarter from my perspective." Delgado timely appealed from the judgment.

DISCUSSION

Delgado argues the trial court erred by not staying his sentence for unlawfully driving or taking the Mini Cooper without its owner's permission under Penal Code section 654 (section 654) because driving the car and evading the police were one continuous act. We disagree.

A. The Relevant Law

Section 654 prohibits a court from imposing multiple punishments for multiple convictions that are based on the same act or course of conduct. It provides in relevant part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (Pen. Code, § 654, subd. (a).)

" '[T]he purpose of section 654 'is to insure that a defendant's punishment will be commensurate with his culpability.' ' ' " (*People v. Capistrano* (2014) 59 Cal.4th 830, 886.) It "precludes multiple punishments for a single act or indivisible course of

conduct.” (*People v. Hester* (2000) 22 Cal.4th 290, 294.) “ ‘ “ ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ ” ’ [Citation.] Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense.” (*People v. Jackson* (2016) 1 Cal.5th 269, 354.)

A defendant who “ ‘harbored “multiple criminal objectives,” which were independent of and not merely incidental to each other, . . . may be punished for each statutory violation committed in pursuit of each objective, “even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” ’ ” ’ (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005.) Also, “ ‘ “ ‘a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]’ [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his . . . intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken.’ ” ’ ” ’ ” (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1113.)

As this court has previously observed, “ ‘the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] “We must ‘view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence.’ ” ’ ” ’ ” (*People v. Deegan* (2016) 247 Cal.App.4th 532, 545, fn. 4.)

We apply this law to the court’s decision to impose consecutive sentences for the two different crimes for which Delgado was convicted. Specifically, these were, first, felony evading a peace officer in violation of Vehicle Code section 2800.2. Section 2800.2 prohibits a person from willfully fleeing “a pursuing peace officer . . . and

the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property,” provided that the peace officer’s vehicle is exhibiting at least one forward facing lighted red lamp that can reasonably be seen, sounding a siren, distinctively marked and operated by a peace officer wearing a distinctive uniform. (Veh. Code, §§ 2800.2, subd. (a), 2800.1, subd. (a).) A “willful or wanton disregard for the safety of persons or property” may include committing three statutorily recognized traffic violations while fleeing or attempting to elude a pursuing peace officer. (*Id.*, § 2800.2, subd. (b).)

Second, Delgado was convicted of driving or taking a vehicle without the permission of the owner in violation of Vehicle Code section 10851. Section 10851 punishes any person who “drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle” (Veh. Code, § 10851, subd. (a).)

B. Analysis

Delgado argues the trial court’s reasoning in rejecting his section 654 argument “admits its fundamental flaw: the court viewed [defendant’s] actions as two different acts: the theft of the vehicle and the later evading from the police once a police car turned on its lights. But that contradicts the fact that the Vehicle Code section 10851 conviction was not based on a theft of the vehicle but rather on driving it”

Defendant bases his contention that the conviction was based merely on his driving the Mini Cooper on the court’s decision not to give the jury the CALCRIM No. 1800 instruction on theft by larceny.

Delgado’s argument mischaracterizes the court’s reasoning. The court said it was removing CALCRIM No. 1800 from its jury instructions both because the prosecutor had dropped count four, the receipt of stolen property charge, and elected regarding the driving or taking a vehicle without the owner’s permission charge “to pursue a temporary deprivation theory commonly known as joyriding as opposed to permanent deprivation theft.” In other words, as allowed under Vehicle Code section 10851, subdivision (a), the

prosecution sought to prove that Delgado had violated that statute by *temporarily* taking the Mini Cooper from the garage *and* driving it without the owner's permission, sometimes referred to as "joyriding" (see *People v. Garza* (2005) 35 Cal.4th 866, 876). The statute may be violated by either a taking or a driving (*People v. Smith* (2013) 57 Cal.4th 232, 242 ["there are two ways of violating section 10851: the defendant can either 'drive' or 'take' the vehicle"]); and, indeed, that Delgado both took and drove the Mini Cooper without permission for a period of time was never in contention during the trial. Consistent with the prosecution's temporary taking and driving theory, the court instructed the jury to find that defendant had violated Vehicle Code section 10851 if the People proved that "defendant *took or drove* someone else's vehicle without the owner's consent" and in doing so "intended to deprive the owner of possession or ownership of the vehicle for any period of time." (Italics added.) In short, Delgado's temporary taking of the Mini Cooper, even if it was not a theft, was nonetheless a *taking*. This is a different act than driving and could reasonably be viewed as resulting from an intent and objective on defendant's part that was separate from and different than driving the Mini Cooper around San Francisco. For this reason alone, we reject Delgado's appellate claim.

Moreover, even if the only acts by Delgado involved driving, there is substantial evidence that rather than engaging in one continuous course of conduct based on the same act, intent and objective, Delgado engaged in two different episodes of driving involving different intents and objectives. That is, Macaulay's testimony indicates that defendant at first drove for about fifteen minutes (from 8:19 p.m., when Macaulay first heard a report about the Mini Cooper, until 8:34 p.m., when he first saw the car) in San Francisco within the normal flow of traffic, as indicated by Macaulay's ability to quickly drive up to within six feet of the Mini Cooper when he first spotted it on Bryant Street. However, after Macaulay attempted a traffic stop, the Mini Cooper sped away and, for at least the next 11 minutes (as indicated by the testimony of Macaulay, Johnson and Williams), travelled at high speeds, as much as 65 miles per hour on city streets, and went through many stop signs and red lights, thereby committing numerous traffic

violations and endangering others. A court could reasonably conclude based on this evidence that Delgado, while continuously driving throughout, engaged in two distinct and different criminal episodes with different intents and objectives: the first being the driving (and taking) of the Mini Cooper, and the second being the evasion of the police officers with willful disregard of the safety of people and property after police began to pursue him.

Indeed, this evidence is even more indicative of separate criminal acts, intents and objectives than the facts discussed in *People v. Jimenez* (2019) 32 Cal.App.5th 409, a recent case that similarly rejected a section 654 challenge. There, local deputies spotted Jimenez, for whom an arrest warrant had been issued, activated their patrol car's lights and sirens and attempted to conduct a traffic stop. (*Jimenez*, at p. 413.) Rather than stop, Jimenez led the deputies on a high-speed pursuit, violating numerous traffic laws and endangering others along the way. (*Id.* at pp. 413–414.) Another deputy driving a marked patrol SUV attempted to assist. The deputy, traveling down a road with the SUV's lights and sirens activated, saw Jimenez coming in the opposite direction. Although Jimenez had room to pass the SUV without colliding with it, he drove into the SUV's lane of traffic, causing the deputy to swerve at the last moment to avoid a head-on collision. (*Id.* at p. 414.)

Jimenez was convicted of and sentenced for evading the officers and for assault, the latter conviction being based on his driving directly at the SUV. He argued on appeal that section 654 prohibited the trial court from sentencing him separately for both convictions because “he harbored the same intent and objective during both the evading and the assault.” (*People v. Jimenez, supra*, 32 Cal.App.5th at p. 425.) The appellate court disagreed. It reasoned that “[t]he evidence was sufficient to support the court’s implied finding that Jimenez had two objectives—he was both intending to evade and trying to assault the deputies in the second vehicle.” (*Ibid.*) Also, the trial court “could reasonably have found that Jimenez had time to reflect before committing the assault. Jimenez could have driven on his side of the road or moved rather than driving head on toward [the SUV]. He chose not to do so, aggravating the severity of the situation.

Jimenez's initial efforts trying to evade the first vehicle, and his subsequent assaultive conduct, 'were volitional and calculated, and were separated by periods of time during which reflection was possible.' ” (*Id.* at p. 426; see also *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1006 [court could impose sentences for both bank robbery and defendant's subsequently evading arrest by reckless driving under Vehicle Code section 2800.2 because “[t]he trial court could have reasonably found that the objective of the robbery was to obtain money from the bank, while the objective of the evading arrest by reckless driving was to avoid being caught by police”].)

Here too, the court could reasonably conclude defendant, after taking the Mini Cooper and proceeding on a joyride, had time to reflect before electing, upon police signaling him to pull over and stop, to speed away in an attempt to evade them, and raced through parts of San Francisco during an extended chase in which he drove through stop signs and stop lights and posed a serious danger to other drivers and pedestrians. His decision was volitional, calculated, and separated in time from his initial foray from the garage onto city streets. The court did not err in rejecting defendant's section 654 argument based on these circumstances.

DISPOSITION

The judgment is affirmed.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

People v. Delgado (A154729)